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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/660,466	09/11/2003	Scott Sims	19467-00012	4942
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PETER F WEINBERG GIBSON DUNN AND CRUTCHER LLP SUITE 4100 1801 CALIFORNIA STREET DENVER, CO 80202			EXAMINER HOEL, MATTHEW D	
			ART UNIT 3714	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/660,466

Applicant(s)

SIMS ET AL.

Examiner

Matthew D. Hoel

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 September 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) 1-36 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Independent Claims 1, 5, 13, 17, 22, 30, and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Friedman (U.S. patent 6,457,715 B1). For clarity, the claims are repeated below.

1. A method of playing a card game comprising: (a) providing a gaming device to a player; (b) receiving a wager from the player at said gaming device; (c) dealing displaying two, face-up cards to the player from one or more deck(s) of playing cards, the ranks of said face-up playing cards defining two or more possible ranges in relation to said face-up cards; (d) displaying said two or more possible ranges to said player; the player after seeing the face-up cards, selecting a range from among the two or more

possible ranges, allocating said wager to said selected range; and (f) revealing a third card and if the rank of said third card is in the range selected by the player issuing an award to the player.

5. A method of playing a card game comprising: (a) providing a gaming device to a player; (b) receiving a wager from the player at said gaming device; (c) displaying two, face-up cards to the player from one or more deck(s) of playing cards; (d) displaying to or more possible ranges to said player; (e) the player, after seeing the face-up cards, selecting a range from among the two or more possible ranges, allocating said wager to said selected range; and (f) revealing a third card and, if the rank of said third card is in the range selected by the player; (g) paying the player based upon the wager, whether the range selected by the player is the range in which the third card falls, and a pay table wherein the pay table is based upon the number of cards present in each said range.

13. A method of playing a card game comprising: (a) receiving a wager from a player; (b) displaying two cards to the player from a deck of playing cards; (c) the player selecting a range from among two or more possible ranges defined by said two playing cards, said wager allocated to at least one of said selected ranges; (d) providing a pay table that is based upon the number of cards in each of the two or more ranges; (e) displaying a third card; and (f) providing the player with a win based upon the pay table and amount wagered if the third card is in the range selected by the player.

17. A method of playing a card game comprising: (a) receiving a wager from a player; (b) displaying two cards to the player from a deck of playing cards; (c) the player

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selecting a range from among two or more possible ranges defined by the two playing cards, wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; a rank in between the rank of the first two cards; a rank equal to the highest rank of the two cards; and a rank higher than the highest rank of the first two cards; (d) providing a pay table that is based upon the number of cards in each of the two or more ranges; (e) displaying a third card; and (f) providing the player with a win based upon the pay table and amount wagered if the third card is in the range selected by the player.

22. A gaming apparatus comprising: (a) means of receiving a wager from a player; (b) means for displaying a first and second card to a player; (c) means for displaying two or more possible ranges defined by said first and second card displayed to said player; (d) means for player selection of one of said possible ranges based upon said first and second card; (e) means for displaying a third card to the player; (f) means for evaluating the third card in comparison to the range selected by the player; and (g) means for providing a payout when said third card is in the range selected by said player.

30. An apparatus for playing a game of cards comprising: (a) an electronic video poker type gaming machine; (b) means for receiving a wager from a player; (c) means for displaying a first and second card to the player; (d) means for displaying two or more possible ranges defined by said first and second cards; (e) means for allowing the player to select one of said ranges; (f) means for displaying a third card to the player;

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(g) means for providing an award to said player when said third card is in the range selected by the player; wherein said award is based in part on the number of cards in the range selected by the player.

31. A method of playing a three card game of cards comprising: (a) placing a wager; (b) displaying two cards to a player; (c) the player selecting one of two or more possible ranges defined by said first two cards wherein a third card may fall; (d) displaying said third card to said player and evaluating whether it falls in the range selected by the player; (e) providing a payout to said player when said card falls in the range selected by the player where such payout is a multiple of the amount wagered, said multiple based upon the number of cards in the range selected by the player.

36. A method for playing a wagering game comprising: (a) providing indicia having a range of values a - z; (b) a player placing a wager; (c) displaying two indicia values, d and r, said two indicia values defining a plurality of wagering ranges of at least two of (i) between d and r and (ii) equivalent to d, (iii) equivalent to r, (iv) below d, and (v) above r; (d) designating the wagering ranges available; (e) after viewing the displayed indicia, the player selecting the designated range to be associated with the wager; (f) displaying a randomly selected third indicia value, said third indicia value being within one of said ranges; and (g) resolving the wager based upon the range of said third indicia and the range associated with the wager.

Friedman in '715 deals two cards face up to a player (Figs. 1 & 2; 1:40-50). '715 then deals a third card to the player and the player then compares the third card to the first two cards (Figs. 1 & 2). '715 displays a plurality of ranges from which the player

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can bet and pays the player based on a pay table according to how much the player has bet if the third card falls within the range selected by the player (2:22-45). One of the possible ranges can be equal in rank to either the first or second cards (2:32), between the first and second cards (2:34), and greater than both the first and second cards or less than the both first and second cards (numeric sequence card rank, 2:32-33).

Alternatively, the third card being equal to the difference between the first and second cards would necessarily mean it is less than both cards (2:37); the third card being equal to the sum of the first and second cards would necessarily mean it is greater than both cards (2:35-36). The amounts paid are based on the amount and type of wager (2:38-41). A gaming apparatus of the sort widely known in the art capable of playing this type of game as in Claims 1, 5, 22, and 31 would have been obvious to one of ordinary skill in the art at the time the invention was made. MPEP 2144.04(III):

“AUTOMATING A MANUAL ACTIVITY In re Venner, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958) (Appellant argued that claims to a permanent mold casting apparatus for molding trunk pistons were allowable over the prior art because the claimed invention combined “old permanent-mold structures together with a timer and solenoid which automatically actuates the known pressure valve system to release the inner core after a predetermined time has elapsed.” The court held that broadly providing an automatic or mechanical means to replace a manual activity which accomplished the same result is not sufficient to distinguish over the prior art.).” There is nothing about the claimed game that can only be played in a card table format or in a video gaming device format. This modification is also suggested by '715 in 2:13-20 with personal

computer and electronic video embodiments.

4. The method of claim 1 wherein the player is paid based upon the wager, whether the range selected by the player is the range in which the third card falls, and a pay table ('715, 2:38-45).
6. The method of claim 5, wherein a bonus is awarded in certain instances where the third card is one or more of the ranks of cards in the range selected ('715, rank 2:32).
7. The method of claim 1 or 5 wherein multiple games are played from a single deck of cards (fifty-two card deck, '715 2:9).
10. A method of claim 1 or 5 wherein a bonus is awarded if the third card is of the same suit as at least one of the first or second cards dealt ('715, suit 2:32).
11. The method of claim 1 or 5 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest of the first two cards; a rank in between the rank of the first two cards; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (these ranges were addressed in the rejection of the independent claims).
12. The method of claim 1 or 5 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; the same rank of either the first or second card when the first and second card are of adjacent ranks; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (these ranges were addressed in the rejection of the independent claims).
14. The method of claim 13 wherein said game is played on an electronic gaming

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machine ('715, 2:13-21).

15. The method of claim 14 wherein the two or more possible ranges defined by said two playing cards are displayed to the player on the display of the electronic gaming machine ('715, electronic display 2:13-21; paytable, 2:38-45).

18. The method of claim 13 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; the same rank of either the first or second card when the first and second card are of adjacent ranks; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (these ranges were addressed in the rejection of the independent claims).

19. The method of claim 13 wherein a bonus is awarded when the third card is one or more of the ranks of cards in the ranges selected ('715, 2: 32).

20. The method of claim 13 wherein a bonus is awarded if the third card is of the same suit as at least one of the first or second cards dealt ('715, 2: 32). 24. The apparatus of claim 22 or 23 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; a rank in between the rank of the first two cards; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (these ranges were addressed in the rejection of the independent claims).

21. The method of claim 13 where multiple games are played from a single deck of cards (fifty-two card deck, '715 2:9).

29. The apparatus of claim 22 or 23 wherein said gaming apparatus is an electronic

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gaming machine ('715, 2:13-21).

25. The apparatus of claim 22 or 23 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; the same rank of either the first or second card when the first and second card are of adjacent ranks; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (these ranges were addressed in the rejection of the independent claims).

28 and 35. The apparatus of claim 23 wherein said pay table is substantially as follows:

Hand	Pay (1 credit bet)
Match Pair (all 3 cards same)	24
Match One (higher or lower)	16
1 card	12
Either Higher or Lower	8
2 cards	6
3 cards	4
4 cards	3
5 cards (1,2,4,5)	2
(middle card - 3)	4
6 cards	2
7 cards (1-3, 5-7)	1
(middle card - 4)	6
8 cards (1-3,6-8)	1

(middle cards - 4 or 5)	3
9 cards (1-4, 6-9)	1
(middle card - 5)	4
10 cards (1-4, 7-10)	1
(middle cards - 5 or 6)	2
11 cards (1-5, 7-11)	1
(middle card - 6)	2
12 cards	1

(note: numbers in () are relative to the range not specific card values)

This is a payable along the lines of '715, 2:38-45 which pays based on the range selected and the amount bet on the wager. The applicants have not stated that the exact layout of this payable solves any stated problem or is for any particular purpose. For example, no mathematical analysis has been given to deterministically demonstrate how this payable have a higher vigorish for the house or entice players to bet more. Also, no studies based on actual game play based on this payable versus other paytables have been submitted to show that this payable has any particular advantage. Also, no correlation has been given between the amounts awarded for these game outcomes versus the percentages of the time these outcomes actually occur. It appears that '715, or the applicants' own invention, would both perform equally as well modified to incorporate this particular pay table. Accordingly, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have modified '715 to include this particular payable since this modification would have been

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considered a mere design consideration which fails to patentably distinguish over '715.

32. The method of claim 31 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; a rank in between the rank of the first two cards; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (ranges addressed in the rejection of the independent claims).

33. The method of claim 31 wherein said two or more possible ranges include one or more of: lower than the lowest rank of the first two cards; the same rank as the lowest rank of the first two cards; the same rank of either the first or second card when the first and second card are of adjacent ranks; a rank equal to the highest rank of the first two cards; and a rank higher than the highest rank of the first two cards (ranges addressed in the rejection of the independent claims).

8. The method of claim 1 or 5 wherein a bonus is awarded for selecting the rank of the third card.

9. The method of claim 1 or 5 wherein a bonus is awarded if the initial two cards dealt are of the same rank.

23. The apparatus of claim 22 including a pay table that is based upon the number of cards in each of said two or more possible ranges.

34. The method of claim 31 wherein a bonus is awarded if the third card is one or more of the ranks of middle cards in the range selected.

Regarding the mathematical relationships of Claims 8, 9, 23, and 34, '715 discloses a wide variety of mathematical relationships between the third card dealt to the player and the first two cards dealt to the player, including same card rank, same card suit, same card rank and suit, numeric sequence card rank, the additional exposed card having a rank falling between the ranks of the two player's cards, the additional exposed card having a rank equal to the sum of the rank of the player's two cards, and the additional exposed card having a rank equal to the difference of the rank of the player's two cards (2:22-45). The claimed relationships here appear to be nothing more than additional permutations. It appears that either '715, or the applicants' invention, would perform equally well modified to include these mathematical relationships as they do not appear to necessarily increase the house's vigorish, increase the amount bet by the player, or be tied to the percentage of the time these outcomes actually occur in the game. Accordingly, it would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to have modified '715 to include the mathematical relationships of any or all of selecting the rank of the third card (presumably independently of the values of the first and second cards), the initial two cards being the same rank, the number of cards in each of the two or more possible ranges, or the third card being one or more of the ranks of middle cards in the range selected because these ranges would have been considered mere design choices which fail to patentably distinguish over '715.

4. Claims 2, 16, and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over '715 in view of Weingardt (U.S. pre-grant publication 2002/0113369 A1).

5. As to Claims 2, 16, and 26: '715 discloses all of the limitations of Claims 2, 16, and 26, but lacks specificity as to placeholders for each of the 13 different ranks. '369, however, teaches placeholders for 13 cards in each of 13 different ranks (Fig. 4, Para. 27). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have applied the placeholders of '369 to '715. This is simply because the game of '715 is based on ranges of the relative ranks of the cards. Giving each rank of cards its own placeholder would have the advantage and effect of clearly displaying to the player the relative rankings of the cards in an easy-to-see visual format to allow for quick decision making to speed up the play of the game. This is especially important in casino environments in which quick game play is more profitable for the house, as more games are played per hour, and therefore, more money is wagered per hour.

6. Claims 3 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over '715 and '369. '369 discloses placeholders for 13 cards of each of 13 different ranks (Fig. 4, Para. 27). '369 does not address the display of the placeholders as sunken areas such that when the cards are dealt they appear to fit into the depressions of their respective rank. The applicants have not stated or disclosed that having the placeholders as sunken areas such that when the cards are dealt they appear to fit into the depressions of their respective rank solves any stated problem or is for any

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particular purpose (Page 5, specification). Moreover, it appears that '369, or the applicants' invention would perform equally well with placeholders as sunken areas such that when the cards are dealt they appear to fit into the depressions of their respective rank. Accordingly, it would have been prima facie obvious to one of ordinary skill in the art at the time of invention to have modified '369 such that the placeholders appear as sunken areas so that when the cards are dealt they appear to fit into the depressions of their respective rank, because such a modification would have been considered a mere design consideration which fails to patentably distinguish over '369. The etched area also appears to be non-functional descriptive matter. Its only purpose is visual realism to simulate an actual game table; the etched area does not appear to pertain to the actual game play itself. The examiner generally points the applicant to *in re Gulack*, *in re Lowry*, *ex parte Carver*, *ex parte Breslow*, and MPEP 2106 concerning descriptive material.

Response to Arguments

7. Applicant's arguments with respect to claims 1 to 36 have been considered but are moot in view of the new ground(s) of rejection. The examiner updated the search, in particular searching "Scarne's Encyclopedia of Card Games," by John Scarne, 1973, HarperCollins, New York. The examiner found the card game Yablon on p. 315, which pertains to ranges of cards. Searching Yablon in the patent literature brought up Friedman (U.S. patent 6,457,715 B1) and Wood (U.S. patent 4,651,997 A). This shows the importance of non-patent literature. The applicants had put some limitations in

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independent form that the examiner had objected to, but the new art is much closer than that previously found so all claims are now rejected. The examiner respectfully disagrees with the applicants as to the claims' condition for allowability.


Conclusion

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew D. Hoel whose telephone number is (571) 272-5961. The examiner can normally be reached on Mon. to Fri., 8:00 A.M. to 4:30 P.M.

9. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert E. Pezzuto can be reached on (571) 272-6996. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

10. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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